



War crimes

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Abstract

The concept of war crimes, historical background, its elements, various types, recent trends and its difference with war has been analyzed in this article. Apart from this in the second chapter the researcher has briefly presented the different war crime trials, such as Nuremberg Trial, Tokyo Trial, etc. Next Chapter deals with the tribunals established by Security Council. This chapter also describes the various conflicts which lead to the establishment of such tribunals. Furthermore, the role and jurisdiction of International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, Special Courts & Tribunals and International Criminal Court is also presented in this Article.

Keywords: concept, crimes, background, Apart

1. Introduction

Serious violation of the laws of war and customs of war as defined under international customary law and international treaties are known as War Crimes in international law.

Historical Background

During the twentieth century the concept of war crime was emerged. At that time the customary laws that were applicable to warfare between various sovereign states were codified at the national level.

In 1474 the first international war crimes trial was held by the Holy Roman Empire i.e., the trial of Peter Von Hagenbach by an ad hoc tribunal. He was convicted and beheaded for the crimes committed by him although he argued that he was just following the orders.

In 1865, Henry Wirz who was a confederated States Army officer was held guilty by a military tribunal. As a result he was hanged for all the crimes committed by him at Andersonville Prison.

Elements of war crimes

Following are some of the elements which are required to be present to constitute the war crime:

1. The victims should be protected under any one or more of the Geneva Conventions of 1949.
2. The perpetrator of crime was aware of the actual circumstances that give rise to such protected status.
3. The conduct was related with an international armed conflict.
4. The perpetrator was aware of the circumstances which established the existence of an armed conflict.

Types of War Crime

Article 8 of the Rome Statute deals with elements of crimes document which contains the lists of various kinds of war crime covered under the statute, however this list is not limited to the war crimes. Some of the mentioned items in the list are:-

1. Willful killing, torture, mutilation or inhumane treatment
2. Biological, medical or scientific experiments which

- cause death or seriously endanger lives
3. Destruction and appropriation of property
4. Compelling service in hostile forces
5. Denying a fair trial
6. Execution without due process
7. Unlawful deportation, transfer or confinement
8. Taking hostages
9. Attacking civilians or civilian objects
10. Attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission
11. Improper use of a flag of truce or distinctive emblems of the Geneva Conventions
12. Employing poison, prohibited gases, liquids, materials or devices
13. Rape, sexual slavery or enforced prostitution
14. The use of child soldiers

Recent Trends

In 1933 a controversial law was passed by the Belgian Legislature. This law provided its courts the right to try the individuals who are accused of any war crime anywhere across the globe. According to this law two Rwandan Nuns were given lengthy prison sentences as both were found guilty of genocide. In 2002, the International Court of Justice invalidated the same.

In 2002, the Belgian government repealed the previous law and it was replaced by a new law. The new law required that:-

1. The victim of the war crime is a citizen or resident of Belgium.
2. The accused is a citizen or resident of Belgium.

In 1998 around 120 countries across the globe adopted the governing statute for International Criminal Court (ICC). It is located permanently at The Hague. The statute provided the ICC with the jurisdiction to deal with the crimes of genocide, aggression, crimes against humanity and War Crimes. On July 1, 2002 the ICC came into existence. By 2016, the statute has been ratified by around 120 countries but till date it has not been approved by three permanent members of the UN Security Council that are China, United

States and Russia.

Difference between war and war crimes

War is the ultimate means of settling international disputes that takes place when the dispute between States does not get settled even by coercive means. States seek to impose their will on each other by way of resorting a war.

War crimes, on the other hand, are the violations of certain rules of warfare such as murder, ill-treatment of prisoners of war, killing of hostages, plunder of public or private property, wanton destruction of cities or towns or villages not justified by military necessity, etc.

War is wider in the scope whereas war crimes can be considered as a smaller part of it. War also includes other offences such as crime against humanity etc.

It may be omitted during civil or inter-state wars. War crimes include summary proceeding, torture, exploitation of private properties, deportation of people against their will, etc. According to article 147 of the Geneva Convention if these acts are committed during the time of wars it is considered war crimes. Further the war crimes may be committed against both the civilians as well as enemy combatants.

Important War Crime Tribunals

During the period of Second World War innumerable numbers of war crimes were committed. Germany was mostly involved in it and to a lesser extent by some of its allies. They were responsible for atrocities, massacres, execution, killings of hostages in occupied territory, etc. These brutal actions were condemned by the Allied Governments and for the purpose of punishing the guilty several war crimes tribunals were established.

Nuremberg Trial ^[1]

Facts: The Nuremberg Tribunal was established to try and punish the war criminals of Germany. The main charges were that they had committed war crimes, crimes against peace and crime against humanity during the Second World War. They also violated the Treaty of Versailles, 1919 and the Pact of Paris, 1928 under the leadership of Hitler.

Judgment and Principles laid down

The Nuremberg Tribunal laid down the following principles while delivering the judgment:

1. The provisions of International Law can be enforced by punishing individuals who commit crime against International Law.
2. The fact that the crime is committed by the head of the State or any responsible government official does not relieve him from responsibility under International Law.
3. The fact that a person acted pursuant to orders of his superior will also not exempt him from responsibility under International Law.
4. The accused had raised the objection that an act cannot be declared as crime nor it can be punished unless there was a pre-existing law. This argument was rejected.
5. Court was of the view that the conduct of aggressive wars started by the Germany was against the Pact of Paris, 1928 and persons involved in organizing and conducting this war were declared guilty. In the opinion

of the Tribunal aggressive war is the highest degree of international crime.

6. The accused argued that since Russia had not signed the Geneva Convention, therefore they could not be punished for the bad treatment towards the Russian prisoners of war. The Court rejected the argument and held them guilty.

Justification and Criticism of Nuremberg Tribunal

War crimes, genocide and crimes against humanity are international crimes. A number of jurists were of the view that since the offenders of these crimes should be given deterrent punishment, so in this respect the Nuremberg Tribunal performed commendable work. The judgment of Nuremberg Tribunal also occupies a significant place in the laws of war in general and war crimes in particular.

On the other hand, there are a number of jurists who have criticized the judgment of Nuremberg Tribunal which can be listed as follows:

1. According to them, the intention of Pact of Paris was not to make war an international crime; therefore it was not proper to lay so much emphasis upon it.
2. Chief Justice Marshall of America pointed out that the Nuremberg Charter was contrary to the principles of criminal law. This is because Nuremberg Charter declared those crimes punishable which were not punishable at the time when the crimes were committed.
3. Prof. Schick was of the view that some of the principles incorporated in the Nuremberg Charter were contrary to the law of nations.
4. The establishment of the tribunal was in such circumstances that it is difficult to say that partial justice had not taken place.
5. The principles propounded by the Nuremberg Judgment gave rise to grave doubts.
6. Most of the judges belong to the victorious nations; therefore Nuremberg Military Tribunal cannot be called an international tribunal in real sense.

Legal Significance of Nuremberg Trial

The principles propounded in the Nuremberg Trial have greatly influenced the International Law, particularly the laws of war relating to war crimes. The Nuremberg Trial made it clear that the laws of war are not only for States but are also applicable upon individuals irrespective of the fact that the individual is some head of the State or high military official. The provisions of the International Law can be enforced by punishing them.

Tokyo Trial

The Tokyo Tribunal was established to try the war criminals of Japan. The Tokyo Tribunal was established by the victorious States which was started on June 4, 1946 ^[2] presided by Sir William. The judges of Tokyo Tribunal were not only from victorious States but from other States too such as Philippine and other countries of the Commonwealth of the Nations. The eminent jurist of India Dr. Radha Vinodpal was one of the judges of the Tokyo Tribunal. The accused objected that since most of the judges belong to the nations which defeated Japan, therefore they

¹ The International Military Tribunal, Nuremberg, (1946) Cmd 1964, AJ.LL, Vol. 41 (1947), p. 172.

² DR. S.K. KAPOOR, INTERNATIONAL LAW & HUMAN RIGHTS 777 (21st ed. 2017)

could not get the justice. This objection was rejected by the court. The Tokyo Tribunal awarded death sentences to the offenders who involved in conducting and organizing war and awarded imprisonment of different terms to those who were accused of war crimes.

The Scuttled U-Boats Case ^[3]

Facts: in this case the one side was one State was Germany and the other side was allied nations. On 4th of May, 1945 the North - Western Command of the German Armed Forces surrendered before the allied nations. In consequence of an armistice agreement the surrender took place and it included the surrender of all the sea vessels in that area. The German Officers signed the instrument of surrender. The instrument was yet to come into effect, in between, these German Officers ordered their subordinate officers to scuttle the U-Boats. The order was subsequently countermanded. But the instructor of the U-Boats, who was accused in this case ordered the scuttling of U-Boats and consequently these U-Boats were scuttled. The accused was arrested and was prosecuted for the violation of laws of war ^[4].

Defence of the accused

The accused in his defence put forward the following two arguments

1. The first defence was that the terms of the instrument of surrender were not intimated to him; therefore he was unaware of it.
2. And the second defence was that he was unaware of the fact that the original order regarding the scuttling of U-Boats was countermanded.

Judgment

The court observed that by 5th May it was clear that the U-Boats had now become the property of allied nations. Any reasonable man could understand that under these circumstances the scuttling of U-Boats would amount to the violation of the laws of war. Therefore, the court was of the opinion that the accused knew that these U-Boats could not be scuttled yet he committed this crime. The accused was held guilty and was sentenced to imprisonment for a period of five years. In this case, the court propounded the following principles:

1. After the signing up of the armistice agreement, the surrendering State as well as the State to whom the surrender is made, this agreement will be binding. After the surrender, if soldiers do not observe and follow the agreement, then they will be guilty of the violations of the laws of war.
2. After the surrender through the armistice agreement, war-boats becomes the property of the conquering State, therefore, a person scuttling the Boats or does any kind of harm to these boats will be guilty of war crimes.

Geneva Conventions

From 1864 to 1949 four related treaties were adopted and they expanded continuously during this period of time. These were popularly known as Geneva Convention. In International law these treaties represented a common framework for the conduct of war. These conventions were

ratified by almost every member state of the United Nations. These conventions are universally accepted as Customary International law.

Further, these conventions are applicable to every situations dealing or related with the armed conflict across the globe. In 1977, Additional Protocols were adopted under the head of Geneva Conventions. These Protocols is considered as the most detailed and comprehensive protections of International Humanitarian law.

The International Humanitarian law till date has not been ratified by a large number of States. Different States adopt different codes and values to deal with wartime conduct. In 1949 due to continuous violation of Geneva Conventions by various signatories the three conventions of Geneva Conversation was revised and further a 4th Convention was added.

First Geneva Convention

This convention was related with the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field. It was adopted in the year 1864. Later in the year 1906 the convention was revised and replaced by new version. Later in 1929, it was further replaced by new version and again in 1949 it was replaced by First Geneva Convention.

Second Geneva Convention

This convention was for the Amelioration of the Condition of Wounded Sick and Shipwrecked Member of Armed Forces at Sea. It was adopted in the year 1906. In 1949 the same was revised and replaced by Second Geneva Convention.

Third Geneva Convention

This convention was related to the Treatment of Prisoners of War. In 1929, the convention related to the Treatment of Prisoners of War was adopted. In 1949 the Third Geneva Convention revised and replaced the previous convention.

Fourth Geneva Convention

In 1949 Convention related to the Protection of Civilian Persons in the Time of War was adopted. This convention was based on 1907, Hague Convention IV.

Further in the year 1977 two additional protocols were adopted and later in 2005 third protocol was adopted. These Protocols are:-

1. Protocol I

Protocol I was adopted in the year 1977. This protocol is related to the Protection of International Armed Conflicts.

2. Protocol II

Protocol II was also adopted in 1977. This protocol is related with the Protection of Victims of Non-International Armed Conflicts.

3. Protocol III

Protocol III was adopted in the year 2005. It is related to the Adoption of an Additional Distinctive Emblem.

Rwanda and Yugoslavia War Crimes Tribunals

In 1933, the United Nations Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian law. This was a serious step taken by UN Council to prevent further acts of ethnic cleansing and acts which were in conflict between the States of Yugoslavia.

³ (1940) 1 Law Reports of Trials of Criminals 55

4DR. S.K. KAPOOR, INTERNATIONAL LAW & HUMAN RIGHTS 774-5 (21st ed. 2017)

The main focus of the Council was to restore peace and security in the Balkan region. Later in 1994 during the month of November the United Nations responded to the various charges of genocide in Rwanda and created ICTR.

ICTR is commonly known as the International Criminal Tribunal for Rwanda. It deals with the Prosecution of Persons Responsible for genocide and other serious Violation of International Humanitarian law committed in the Territory of Rwanda. Rwandan Citizens were held responsible for all the activities committed in the Territory of Rwanda as well as neighboring States which resulted in Genocide or other such violation during the period from 1st January to 31st December 1994.

Further ICTY tribunal was created in 1993. ICTY is popularly known as International Criminal Tribunal for the former Yugoslavia. It is located in The Hague. The ICTR is located in Arusha. Both the ICTR and ICTY tribunal did not sat in the country and are International in their composition. Both the tribunals had a common appellate chamber and similar governing statutes. ICTY and ICTR are empowered to impose only terms of imprisonment as a punishment. There is no centralized International Prison established for the persons convicted of War Crimes before ICTY and ICTR.

Jurisdiction

The International Criminal Tribunal for the former Yugoslavia was given jurisdiction to the cases and situations dealing with:-

1. When there is grave breaches of the Geneva Convention.
2. When there is violation of the laws or any customs of War.
3. When there is Commission of an act of genocide
4. When Crimes against humanity is committed.

The International Criminal Tribunal for Rwanda jurisdiction is limited to Rwanda leaders only. The lower level defendants are to be tried by domestic courts. Charges of Rape, Murder, torture, deportation and enslavement are such crimes which can be tried by both the tribunals. These tribunals are the first International bodies to recognize the sexual offences as War Crimes.

Tribunal Established By Security Council

There is a large variety of tribunals and international courts that has been established by the Security Council. These are:-

a. International Criminal Tribunal for the former Yugoslavia

In June 1991, war has started in the Balkans region as a result of disintegration of Yugoslavia. During that period of time Slovenia and Croatia declared themselves as independent states.

After the fight which took place in Slovenia and Croatia, a large portion of the Yugoslavia National Army troops shifted to Bosnia-Herzegovina region. In March 1992, Bosnia was also declared as an independent state. Serbian militia attacked throughout Bosnia. Serbia acquired large parts of Bosnia-Herzegovina. Later Serbia started a "ethnic cleansing" of those persons who were either Non-Serbs or Disloyal Serbs. Many Bosnian Serbs violated humanitarian law as they extensively committed atrocities like rape,

murder, starvation of prisoners, etc.

On 22 February, 1993 United Nations Security Council Resolution 808 decided that for the prosecution of persons responsible for serious violations of International Humanitarian law that was committed by them in the territory of the former Yugoslavia since 1991, An International tribunal should be established. Further the United Nations Security Council called the Secretary General to submit a report dealing with all the aspects on this matter taking into account suggestions which were proposed by Member States

Klaus Kinkel the Foreign Minister of Germany was the person who originally proposed the Court. The International community tried to pressurize the leaders of the former Yugoslavian Republics by Resolution 827 through juridical means by 25 May, 1993. Resolution 827 approved the report submitted by the Secretary General and adopted the Statute of the International Tribunal. As a result of this report the International Criminal Tribunal for the former Yugoslavia was formally created as an unprecedented and historic decision under Chapter VII of Charter. It also declares that the ICTY will have jurisdiction to the following crimes committed in the former Yugoslavia since 1991:-

- a. Grave breaches of Geneva Convention
- b. Genocide
- c. Violations of laws and customs of War
- d. Crimes against Humanity.

Under Resolutions 808 and 827 widespread violations of the International Humanitarian law was defined as acts which constituted a threat to International Peace and Security. Biljana Plavasic, a politician who was instrumental in the conflict of former Yugoslavia was granted an early release by the International Criminal Tribunal for the former Yugoslavia. She was sentenced to almost 11years of imprisonment in 2003 later, she was released on 15th September 2009 as she had shown substantial remorse. But the release was widely criticized.

b. International Criminal Tribunal for Rwanda

President of Rwanda, Juvenal Habyarima was killed in an air crash in the year 1994. Immediately, after his death about 5,00,000 members of Tutsi a minority community in Rwanda territory were slaughtered by the Rwanda Army within two and a half months. International Committee of the Red Cross submitted a report by which the Security Council condemned all the breaches of International Humanitarian law against civilian population in Rwanda. As per the report of the Secretary General's Expert Committee and of the Special Reporter of the Human Rights Commission of the United Nations and further the support of the new Rwanda's Justice Minister, the Security Council established the International Criminal Tribunal for Rwanda.

Case: - Niyonteze vs. Public Prosecutor

This was the first case of conviction for war crimes committed in an internal armed conflict in which Municipal Court exercised its universal jurisdiction under the Geneva Conventions 1949 and Additional Protocol II. This was also the first case in which a court has ordered conviction with respect to Genocide against the Tutsi and the widespread massacre in the Rwanda territory during the armed conflict between the Rebel Army of Rwandan Patriotic Front and Government forces.

c. Special Courts and Tribunals

To bring Justice to the victims of International Crimes, the United Nations has established a large number of tribunals. International Criminal Tribunal for Rwanda and International Criminal Tribunal for the former Yugoslavia were established by the Security Council. Further there has been significant involvement of United Nations in various ways with the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone and several other courts.

d. International Criminal Court

International Criminal Court is an independent juridical body which is located in The Hague. In order to meet the urgent needs of the time the Criminal Tribunals of Rwanda and Yugoslavia were created. But there was the need of a permanent International Criminal Court. In 1998, the Rome Statute established the International Criminal Court (ICC). This court was given the jurisdiction to decide war crimes cases along with genocide and crimes against humanity cases. Till date many states including United States are not the party to this new court which is considered as its weak point.

Conclusion & Suggestions

War crimes are such hostile or other acts of soldiers or other individuals as may be punished by the enemy on capture of the offenders^[5]. Major war crimes were committed during Second World War which led to the establishment of various tribunals (trials) such as Nuremberg Trial, Tokyo Trial and Eichman Trial. Due to certain limitations the researchers have dealt some of the tribunals (trials).

War crimes can be said as the supplementary of the outrage of wars. Wherever there is war, there will be surety of commission of war crimes. There are many conventions and treaties to stop the war crimes but those are not much satisfactory. In the opinion of the researcher the only way for the prevention of war crimes is that *prima facie* it must be ensured that war should not take place. Any sort of dispute can be sorted out by sitting on a round table rather than generating pool of blood in battle field.

Talking about the strain relationship of India and Pakistan there can be play of clarion for war at any time. If any such mishaps takes place then there can be commission of war crimes on a mass level and as per study of researchers in US, a nuclear war between India and Pakistan could in less than a week may kill 50-125 million people^[6] which is more than the death toll during all six years of World War – II! This will not only be destruction for mankind but equally for our planet.

There is an English proverb - "Prevention is better than cure." Therefore, there should evolve some sort of effective mechanism to resolve so that disputes between States can be resolved. No disputes means no war, and ultimately no war means no war crimes.

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⁵2 OPPENHEIM, INTERNATIONAL LAW 566 (7th ed.).

⁶India-Pakistan nuclear war may kill up to 125 million people: Study, PTI (Oct. 03, 2019, 02:30 PM), <https://economictimes.indiatimes.com/news/defence/india-pakistan-nuclear-war-can-kill-over-10-crore-people-study/articleshow/71418630.cms>.